Filed 4/28/20 P. v. Rainey CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TYRELL JAMES RAINEY, Defendant and Appellant.	E072758 (Super.Ct.No. FSB1103711) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Lynne McGinnis and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

In 2012, defendant and appellant Tyrell James Rainey was convicted of first degree attempted murder (Pen. Code,[1] §§ 664/187, subd. (a)) as an aider and abettor. In 2018, the Legislature limited accomplice liability for murder. Generally, accomplices can no longer be convicted of murder under the felony murder rule or the natural and probable consequences theory. The Legislature also enacted a statute allowing accomplices previously convicted of murder to petition trial courts to vacate their murder convictions and be resentenced. (§ 1170.95.)

Defendant filed a petition under section 1170.95. The trial court denied defendant's petition because he was convicted of attempted murder, not murder.

Defendant appeals, arguing the Legislature intended to include attempted murder under section 1170.95. We disagree and affirm the order of the trial court.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant and Eric Moss became angry when asked to leave a barbecue party they attended with A.Z., Moss's former girlfriend. Defendant told the hosts it was unwise to kick them out when they knew where their apartment was located. Later, defendant,

---

[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] A summary of the factual background is taken from this court's nonpublished opinion in defendant's prior appeal, case No. E058265. (*People v. Rainey* (Nov. 4, 2014, E058265) [nonpub. opn.] (*Rainey I*).)

Moss, and Jermaine Allen returned. Defendant banged on the door of the upstairs apartment, then ran downstairs until S.C. and M.G., one of the hosts, went downstairs. After a few blows were exchanged, Jermaine Allen stepped forward with a rifle and shot S.C. in the chest area, causing permanent paralysis. (*Rainey I*, *supra*, E058265 at p. 2.)

Defendant was charged with the premeditated attempted murders (§§ 664/187, subd. (a)) of S.C. and M.G., with special allegations that a principal was armed with a firearm (§ 12022, subd. (d)).[3] A jury acquitted defendant of the count involving M.G., but he was convicted of premeditated attempted murder of S.C., along with the special allegation that a principal was armed with a firearm. He was sentenced to a determinate term of four years and an indeterminate term of life with possibility of parole. This court affirmed the judgment on direct appeal. (See *Rainey I*, *supra*, E058265 at pp. 2, 17.)

On February 1, 2019, defendant filed a section 1170.95 petition. Defendant declared that he was convicted of "premediated attempted murder as an aider and abettor under the [n]atural and [p]robable consequences on the prosecutions [*sic*] theory."

On April 23, 2019, the trial court summarily denied defendant's section 1170.95 petition. According to the court's memorandum of decision: "The petition is summarily denied because the petitioner is not entitled to relief as a matter of law, for the following reason: [¶] . . . The petitioner was not convicted of murder."

---

[3] Another special allegation related to an enhancement for committing the offense while on bail (§ 12022.1). Defendant admitted this enhancement prior to the commencement of trial. (*Rainey I*, *supra*, E058265 at p. 2, fn. 2.)

On May 15, 2019, defendant timely appealed from the trial court's summary denial of his section 1170.95 petition.

III

DISCUSSION

Defendant argues section 1170.95 applies to convictions for attempted murder because, although attempted murder is not enumerated in section 1170.95, the legislative intent of the statute indicates it should apply to persons convicted of attempted murder. This is a pure legal issue involving statutory interpretation. Therefore, our review is de novo. (See *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

A. *Principles of Statutory Interpretation*

When construing a statute, our goal is to ascertain legislative intent to effectuate the purpose of the law. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) The words of a statute are to be given their usual and ordinary meaning. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.) If the statutory language is unambiguous, "we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*People v. Robles* (2000) 23 Cal.4th 1106, 1111.)

Courts may neither insert words nor delete words in an unambiguous statute; the drafting of statutes is solely a legislative power. (*People v. Hunt* (1999) 74 Cal.App.4th 939, 945-946.) "In construing this, or any, statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. We may not rewrite the statute

to conform to an assumed intention that does not appear in its language." (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.)

"Statutory language is not considered in isolation. Rather, we 'instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.'" (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261.) We must also "interpret legislative enactments so as to avoid absurd results." (*People v. Torres* (2013) 213 Cal.App.4th 1151, 1158.)

B. *The Statutory Framework and Language of Section 1170.95*

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Although under the felony murder rule, a defendant can be convicted of murder without malice if a victim is killed during a designated inherently dangerous felony. (See CALCRIM No. 540A ["A person . . . may be guilty of felony murder even if the killing was unintentional, accidental, or negligent"].)

Generally, a defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (§ 31.) An aider and abettor can be held liable for crimes that were intentionally aided and abetted (target offenses). An aider and abettor can also be held liable for any crimes that were not intended but were reasonably foreseeable (non-target offenses). (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463.) Liability for intentional, target offenses is known as direct aider and abettor liability. Liability for unintentional, nontarget offenses is known as the "'"natural and probable consequences" doctrine.'" (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1055.)

Effective January 1, 2019, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); see *People v. Martinez* (2019) 31 Cal.App.5th 719, 722-723 (*Martinez*).)

Senate Bill No. 1437 accomplished that purpose by substantively amending section 188 (defining malice), and section 189 (defining the degrees of murder). Under amended section 188, subdivision (a)(3), "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." Amended section 189 limits first degree murder liability based on a felony murder theory to a person who: (1) was the actual killer; (2) although not the actual killer, intended to kill and assisted the actual killer in the commission of first degree murder; or (3) was a major participant in the underlying felony who acted with reckless indifference to human life. (§ 189, subd. (e).)

Senate Bill No. 1437 also added section 1170.95, which creates a procedure by which persons convicted of felony murder or murder under a natural and probable consequences theory may seek resentencing. (*Martinez*, *supra*, 31 Cal.App.5th at pp. 722-723.) Subdivision (a) of section 1170.95 provides:

"(a) A person *convicted of felony murder or murder* under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to

have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

"(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of *felony murder or murder* under the natural and probable consequences doctrine.

"(2) The petitioner was convicted of *first degree or second degree murder* following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

"(3) The petitioner could not be convicted of *first or second degree murder* because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a), italics added.)

If the trial court determines the petitioner has made a prima facie showing of eligibility, the court must issue an order to show cause and hold a hearing to determine whether to vacate the murder conviction and recall the sentence. (§ 1170.95, subds. (c), (d)(1).) At that hearing, the prosecution bears the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) If the prosecution does not sustain its burden of proof, then the prior conviction, including any enhancements, must be vacated and the petitioner resentenced on the remaining charges. (*Ibid*.) "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Ibid*.)

This sentencing recall and resentencing procedure is available to offenders whose sentences are final, as well as those whose sentences are not yet final. (*Martinez, supra*, 31 Cal.App.5th at pp. 723, 727.) In addition, Senate Bill No. 1437 applies retroactively. (*Id*. at pp. 722, 724-727.)

C. *Analysis*

Senate Bill No. 1437 affects murder convictions. It does not apply to convictions for attempted murder. None of the added or amended sections make any reference to attempted murder. (§§ 188, 189, 1170.95.) "If the plain language of the statute is clear and unambiguous, [the courts'] inquiry ends, and [one] need not embark on judicial construction." (*People v. Johnson* (2002) 28 Cal.4th 240, 244.)

Two appellate courts in the Second District recently held that Senate Bill No. 1437 does not apply to the crime of attempted murder, based upon reasoning that is equally apt here. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104-1105 (*Lopez*), review granted Nov. 13, 2019, S258175, and *People v. Munoz* (2019) 39 Cal.App.5th 738, review granted Nov. 26, 2019, S258234.) In *Lopez*, the appellate court concluded the "Legislature's obvious intent to exclude attempted murder from the ambit of the Senate Bill [No.] 1437 reform" was evidenced by the language of section 1170.95 itself, as it limits its application to murder convictions. (*Lopez*, at pp. 1104-1105.) The court further observed: "The plain language meaning of Senate Bill [No.] 1437 as excluding any relief for individuals convicted of attempted murder is fully supported by its legislative history." (*Id*. at p. 1105.) The court noted the Legislature consistently referred to relief

being available to only those defendants charged with first or second degree felony murder or murder under the natural and probable consequences doctrine, and to only those defendants sentenced to first or second degree murder. (*Ibid*.)

In considering the legislative history of Senate Bill No. 1437 to buttress its interpretation of the statutory language, the *Lopez* court stated: "When describing the proposed petition process, the Legislature consistently referred to relief being available to individuals charged in a complaint, information or indictment 'that allowed the prosecution to proceed under a theory of first degree felony murder, second degree felony murder, or murder under the natural and probable consequences doctrine' and who were 'sentenced to first degree or second degree murder.' [Citation.] In addition, when discussing the fiscal impact and assessing the likely number of inmates who may petition for relief, the Senate Committee on Appropriations considered the prison population serving a sentence for first and second degree murder and calculated costs based on that number. [Citation.] The analysis of potential costs did not include inmates convicted of attempted murder." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1105.)

In *Lopez*, the defendants argued that, "by redefining the elements of murder, Senate Bill [No.] 1437 impliedly eliminated the natural and probable consequences doctrine as a basis for finding an aider and abettor guilty of attempted murder . . . ." (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) The court found the argument unavailing, explained: the defendants' "premise of this implied repeal argument is that, generally to be guilty of an attempt to commit a crime, the defendant must have specifically intended

to commit all the elements of that offense. Since a conviction for murder now requires proof of malice except as specified in section 189, subdivision (e), and malice may not be imputed to a person based solely on his or her participation in an underlying crime, they reason, the natural and probable consequences theory of aider and abettor liability is no longer viable. [¶] [The defendants'] premise, that to be guilty of an attempt an accomplice must have shared the actual perpetrator's intent, is correct as to direct aider-and-abettor liability [citations], but it is inapplicable to offenses charged under the natural and probable consequences doctrine, which is based on a theory of vicarious liability, not actual or imputed malice. [Citation.] As a matter of statutory interpretation, Senate Bill [No.] 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder." (*Lopez*, at pp. 1105-1106.)

The court in *Munoz*, *supra*, 39 Cal.App.5th 738, agreeing with *Lopez*, held that Senate Bill No. 1437 plainly and unambiguously applies only to murder because "section 1170.95 . . . speaks only in terms of murder, not attempted murder." (*Munoz*, at p. 754.) As the *Munoz* court noted, "[w]here the words of the statute are clear, we are not at liberty to add to or alter them to accomplish a purpose that is not apparent on the face of the statute or in its legislative history." (*Id*. at p. 755.)

The Fifth District in *People v. Larios* (2019) 42 Cal.App.5th 956 (*Larios*), review granted Feb. 26, 2020, S259983, and *People v. Medrano* (2019) 42 Cal.App.5th 1001 (*Medrano*), review granted March 11, 2020, S259948, reached a different conclusion than the *Lopez* court on the issue of accomplice liability. The courts held that Senate Bill No. 1437's changes to sections 188 and 189 preclude imposition of vicarious liability under the natural and probable consequences doctrine if the charged offense requires malice aforethought. (*Larios*, at p. 966; *Medrano*, at p. 1013.) As the *Larios* court explained, section 188, as amended, stated that "'malice shall not be imputed to a person based solely on his or her participation in a crime'" (*Larios*, at pp. 967-968), and contained "no exceptions for attempted murder, which indisputably requires express malice." (*Id.* at p. 967.) Based on section 188, the *Larios* court determined Senate Bill No. 1437 modified accomplice liability for both murder and attempted murder. (*Larios*, at p. 968.) Accordingly, because under the amended statutes malice cannot be imputed to a defendant who aids and abets a target offense without the intent to kill, the natural and probable consequences doctrine is no longer a viable theory of accomplice liability for attempted murder. (*Larios*, at p. 966; *Medrano*, at p. 1013.)

Even so, *Larios* "agree[d] with the reasoning of *Lopez* . . . that the relief provided in section 1170.95 [was] limited to certain murder convictions and excludes all other convictions, including a conviction for attempted murder." (*Larios*, *supra*, 42 Cal.App.5th at p. 970.) The court reasoned "[t]he plain language of section 1170.95, subdivision (a) limits relief to persons 'convicted of felony murder or murder under a

natural and probable consequences theory [to] file a petition with the court . . . .'" (*Id.* at p. 969; see *Medrano, supra,* 42 Cal.App.5th at pp. 1017-1018 [Senate Bill No. 1437 amended accomplice liability for both murder and attempted murder, but the "unambiguous language" of section 1170.95 is limited to persons convicted of murder].) No language in section 1170.95 references relief to persons convicted of attempted murder, and the legislative history of Senate Bill No. 1437 supports the conclusion section 1170.95 was intended to apply only to persons convicted of murder. (*Larios*, at p. 969; *Medrano,* at p. 1017.) Thus, even courts that have taken a broader interpretation of the changes made by Senate Bill No. 1437 have concluded that section 1170.95 limits relief only to defendants convicted of murder.

Defendant argues that *People v. King* (1993) 5 Cal.4th 59 (*King*) compels a different result. We disagree. In *King*, there had been several changes over time to interrelated statutes in the Penal Code and the Welfare and Institutions Code. Appellate courts had interpreted the statutes in a way that resulted in a sentencing anomaly: certain juveniles convicted of first degree murder were eligible for commitment to the former California Youth Authority (CYA), but similar juveniles convicted of attempted first degree murder were required to be confined in prison. (*Id.* at pp. 64-70.) The California Supreme Court disagreed, holding that the Legislature "did not intend a lesser included offense to have potentially harsher penal consequences than the greater offense. Defendant should not be penalized because one of his victims survived; he should not be made to regret not applying the coup de grace to that victim." (*Id.* at p 69.)

Here, unlike *King*, Senate Bill No. 1437 "is not the result of a disjointed series of amendments over time . . . from which we might infer inadvertence or irrationality [on the part of the Legislature]. Instead, the relevant provisions are contained in a single cohesive bill." (*Munoz*, *supra*, 39 Cal.App.5th at p. 759.) Further, in the situation described in *King*, *supra*, 5 Cal.4th 59, "first degree murderers under 18 were eligible for CYA, whereas persons of the same age who committed attempted murder were not. Here, in contrast, Senate Bill [No.] 1437 does not mandate that persons convicted of attempted murder are punished more severely than persons convicted of murder. Attempted murderers are statutorily subject to a lesser, not a greater, penalty than murderers. Senate Bill [No.] 1437 does not require that attempted murderers receive a harsher sentence, or prohibit them from receiving a more lenient sentence, than murderers." (*Munoz*, at p. 759.) In sum, the California Supreme Court's holding in *King* does not alter our analysis.

We agree with the courts in *Lopez* and *Munoz* and conclude Senate Bill No. 1437 does not apply to defendants convicted of attempted murder. Defendant asserts that we should not follow *Lopez* and *Munoz* because they were wrongly decided. We disagree, and reject defendant's arguments to the contrary.

Based on the foregoing, as defendant was not convicted of murder, the trial court did not err by summarily denying his section 1170.95 petition.

IV

DISPOSITION

The trial court's order denying defendant's section 1170.95 petition is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.